No. 12-10

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Over a three-judge dissent from the denial of rehearing en banc, the Second Circuit enjoined on constitutional grounds an important provision in an Act of Congress. That provision places a condition on the receipt of federal aid aimed at reducing the spread of HIV/AIDS: recipients must "have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f), to ensure that the government's message opposing those activities is communicated by its private partners wherever in the world federal funds are spent. Respondents do not deny that because they represent most of the domestic groups receiving the HIV/AIDS funding at issue, the decision below effectively enjoins the operation of Section 7631(f) with respect to organizations based in the United States. At a minimum, then, respect

for Congress warrants this Court's plenary review, even in the absence of a conflict. In fact, however, the Second Circuit's decision creates a square circuit conflict and currently merits this Court's attention, as every judge to consider the question at the rehearing stage below recognized.

A. The Court Of Appeals Invalidated A Significant Provision Of An Act Of Congress And Of An Important Federal Program

1. As the government has explained (Pet. 12-22), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. 7601 *et seq.*, directs the President to establish a comprehensive international strategy to fight the transmission of HIV/AIDS, with "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (Supp. V 2011). Congress thus directed that all prevention efforts funded under the Act should aim at reducing or eliminating the underlying causes of HIV/AIDS, including prostitution and sex trafficking. Section 7631(f) is central to that task: it ensures that if respondents wish to receive funds under the Act, they "must communicate the message the government chooses to fund." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 764 (D.C. Cir. 2007) (*DKT*). If the government were required to engage as partners organizations that are neutral toward or that even affirmatively disagree with efforts to oppose prostitution and sex trafficking, the government's message opposing those activities could be "garbled" or "distorted" by the activities of federal funding recipients. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

Respondents agree (Br. in Opp. 27-29) that Congress opted in the Leadership Act for a comprehensive strategy to combat the global spread of HIV/AIDS. They simply believe that Section 7631(f) is a "*marginal* provision" of the Act, which in their view is really "designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words." *Id.* at 29, 31 (emphasis added). The panel majority believed the same thing and rejected the government's contention "that advocating against prostitution [and sex trafficking] is indeed 'central' to the Leadership Act Program." Pet. App. 33a. But as the government has explained (Pet. 18-19), it is for *Congress*—not respondents or the lower courts—to decide when a condition on the receipt of federal funds is integral to the funding program at issue. Here, Congress determined in enacting the Leadership Act that the reduction of prostitution and sex trafficking is important in preventing the global spread of HIV/AIDS. Respondents obviously disagree with that legislative judgment, but they cannot blue-pencil an Act of Congress and then ask this Court to look the other way.

2. Respondents emphasize (Br. in Opp. 32-33) that the case is interlocutory, because the injunction here is preliminary rather than final. The interlocutory status of a case can, of course, counsel against granting review, but that consideration applies with far less force when a lower court's constitutional ruling prevents the government from implementing or enforcing an Act of Congress. See, *e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 55-56 (2006) (reviewing in interlocutory posture whether the Solomon Amendment violated the First Amendment); *Cutter* v. *Wilkinson*, 544 U.S. 709, 717-718 (2005) (reviewing in interlocutory posture whether a federal statute violated

the Establishment Clause). Moreover, further proceedings here could not bear on the constitutional question, because the panel majority's reasoning was that Section 7631(f) violates the First Amendment. See Pet. 29-30. Notably, respondents do not contend otherwise. They do not claim that remanding the case could even potentially affect the panel majority's determination of unconstitutionality.

Respondents propose that on remand the government could "make out a factual case of harm." Br. in Opp. 31 n.11; see *id.* at 14-15, 31. It is hard to know what purpose that evidentiary presentation would serve. The panel majority "conclude[d] that [Section] 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and [the Second Circuit] have upheld as permissible conditions on the receipt of government funds." Pet. App. 3a. Respondents offer no basis for believing that this conclusion would be altered by any evidentiary showing. Simply put, respondents point to nothing meaningful that could happen on remand.

3. Respondents do not dispute (Br. in Opp. 5-6 & n.4) that they represent most of the groups based in the United States that receive the HIV/AIDS funding at issue. As a result, the decision below effectively enjoins the operation of Section 7631(f) with respect to domestic organizations. That wholesale invalidation of a provision of federal law in itself warrants this Court's review. See, *e.g.*, *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009) (reviewing a nationwide preliminary injunction that prevented agency from enforcing regulations). Moreover, delaying review while the lower courts convert the preliminary injunction into a permanent one would only exacerbate the government's injury: private entities would continue to receive billions of dollars in

federal aid while ignoring a condition that Congress attached to that funding. For six years, respondents have been able to accept federal funds and yet advance views that are inconsistent with or even directly contrary to Congress's comprehensive strategy against HIV/AIDS. The government should not have to wait any longer to validate an Act of Congress.[1]

B. The Decision Below Creates A Square Circuit Conflict

1. As the government has explained (Pet. 22-25), the panel majority's approach in this case squarely conflicts with the District of Columbia Circuit's decision in *DKT*. In both this case and *DKT*, the courts of appeals considered virtually identical First Amendment challenges to Section 7631(f) brought by domestic funding recipients. In this case, the Second Circuit upheld that challenge because the statute "compels grantees to espouse the

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[1] Respondents briefly contend that review is unwarranted because "even if this Court were to grant and reverse on the First Amendment issue, the Policy Requirement would still be vulnerable to a vagueness challenge." Br. in Opp. 33. Neither of the courts below addressed respondents' vagueness challenge, see Pet. App. 36a n.8, 214a-215a, 250a, and respondents do not point to any other court that has done so. Respondents cannot stave off review of the panel majority's novel First Amendment holding (and its resulting facial invalidation of an important provision of an Act of Congress) by pointing to their equally novel vagueness challenge. Indeed, respondents do not even claim that the statute itself is vague. Section 7631(f) requires respondents to "have a policy explicitly opposing prostitution and sex trafficking," and they have not pointed to any lack of clarity in that requirement. Rather, they challenge the HHS and USAID affiliation guidelines, which allow funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). See, *e.g.*, 45 C.F.R. 89.3. But even assuming the agencies' regulations were unconstitutionally vague, that would not provide any basis for the panel majority's decision invalidating the statute.

government's position on a controversial issue." Pet. App. 36a. In *DKT*, the District of Columbia Circuit rejected the challenge because the statute "does not compel [grantees] to advocate the government's position on prostitution and sex trafficking; it requires only that if [a grantee] wishes to receive funds it must communicate the message the government chooses to fund." 477 F.3d at 764. There is no way to reconcile those directly contrary conclusions.

Unlike respondents, the panel majority did not even try. It cited the District of Columbia Circuit's decision in *DKT* but made no attempt to distinguish it. Pet. App. 31a. At the rehearing stage, every judge to address the question agreed that the panel decision and *DKT* are flatly inconsistent. See *id.* at 108a (Pooler, J., concurring in the denial of rehearing en banc) (noting that the panel decision "created a circuit split"); *id.* at 103a (Cabranes, J., dissenting from the denial of rehearing en banc) ("[T]he panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution."). Indeed, the district court held here that "DKT International * * * is barred from seeking relief in this action because its application is prohibited by the principles of res judicata," as a result of having lost its nearly identical First Amendment challenge in *DKT*. *Id.* at 250a-251a. Respondents are therefore alone in asserting that the two decisions—one allowing, and the other enjoining, Section 7631(f)'s enforcement—are consistent.

2. Respondents incorrectly argue (Br. in Opp. 12-15) that *DKT* is distinguishable because it rested on two mistaken factual assumptions—one about the agencies'

affiliation guidelines and another about the harms to the government from failing to enforce Section 7631(f).

a. The court in *DKT* explained at length why Section 7631(f)'s funding condition is not importantly different from similar conditions that this Court has upheld in cases like *Rust* v. *Sullivan*, 500 U.S. 173 (1991). See *DKT*, 477 F.3d at 761-762. The plaintiff-organization in *DKT* argued, however—just as respondents do here (Br. in Opp. 22-23)—that *Rust* "involved funding restrictions only on *projects*, not on *grantees*." *DKT*, 477 F.3d at 763. The court in *DKT* squarely rejected that distinction. The court reasoned that just as a clinic in *Rust* could advocate abortion "through programs that [were] separate and independent from the project that receives Title X funds," *ibid.* (quoting *Rust*, 500 U.S. at 196), so too here a funding recipient could "set[] up a subsidiary organization that certifies it has a policy opposing prostitution," *ibid.* The court in *DKT* correctly recognized that the constitutionality of Section 7631(f) does not depend on whether respondents have to divert federal funds into separate projects or separate affiliated entities. See *Velazquez* v. *Legal Services Corp.*, 164 F.3d 757, 766-767 (2d Cir. 1999) (upholding funding restrictions on grantees rather than projects).

Respondents incorrectly assert (Br. in Opp. 13) that it is more difficult to establish an affiliated entity than the court in *DKT* envisioned. In fact, the agencies' guidelines are *more* favorable to respondents than the *DKT* court foresaw. The court in *DKT* assumed that a funding recipient would have to form a separate subsidiary organization. See 477 F.3d at 763 & n.4. In April 2010, however, the agencies modified their affiliation guidelines so that legal separation between an organization and its affiliate would no longer be required but

would be only one factor in determining an affiliate's independence. See Pet. App. 10a-11a. In any event, the disagreement between the Second and the District of Columbia Circuits has nothing to do with the level of *practical* difficulty in forming an affiliate. Rather, those courts disagree over whether, assuming there is no barrier to forming an affiliate, that resolves any *constitutional* difficulty. See *id.* at 35a (reasoning that the affiliation guidelines do not remedy "compelled-speech type problems" because "whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution").

b. In respondents' view (Br. in Opp. 14-15), the court in *DKT* uncritically accepted the government's assertion that Section 7631(f) is a necessary component of the Leadership Act. According to respondents, "the preliminary injunction * * * in this case has now been in place six years and the government has presented no evidence that Leadership Act programs have been 'undermined' or that the government's message has been 'confused.'" *Ibid.* Again, respondents' argument has nothing to do with the disagreement between the courts of appeals. Congress decided that its goals in the Leadership Act would be undermined if two conflicting viewpoints could be advanced by the same federal funding recipient: a message opposing prostitution and sex trafficking with their federal funds and a contrary message with their private funds. The Second Circuit has held that the First Amendment bars Congress from making that legislative judgment; the District of Columbia Circuit has held that it does not. That significant constitutional question merits this Court's review.

C. The Decision Below Is Incorrect

1. Respondents argue at length (Br. in Opp. 17-30) that the decision below is correct. Needless to say, those arguments could and should be fully addressed in the parties' merits briefs. At a general level, however, respondents' arguments ignore that Section 7631(f) is a condition on the receipt of federal funds rather than a direct regulation of speech. For instance, respondents argue (*id.* at 18-19) that Section 7631(f) is subject to heightened scrutiny, citing this Court's cases on compelled speech and viewpoint-discrimination. Those cases, however, did not involve Congress's spending power. As the District of Columbia Circuit has recognized, that distinction is critical. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message" by denying them access to an "already-existing public benefit." *DKT*, 477 F.3d at 762 n.2.

Indeed, this Court previously has held that a viewpoint-based funding condition is subject to heightened scrutiny only when it is "aimed at the suppression of dangerous ideas." *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)); see *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) ("The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.") (internal quotation marks and brackets omitted). Respondents do not cite, let alone discuss, those cases. Nor have they argued, and the panel majority did not conclude, that Section 7631(f)'s policy requirement is aimed at suppressing

dangerous ideas. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." Pet. App. 83a-84a.

2. Respondents contend that "affirmative compulsion of speech [is] more troubling than an affirmative compulsion of silence." Br. in Opp. 20. But as the government has explained (Pet. 16), this Court has rejected that affirmative-negative distinction as without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Respondents neither address *Riley* nor offer any reason why the distinction should assume constitutional significance in the context of funding conditions. Respondents cite *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), but in those cases this Court simply held that citizens could not be compelled to speak when they wished to remain silent. The Court did not hold that silencing those who wish to speak is a less serious matter under the First Amendment. See Pet. App. 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions.").

3. Finally, respondents emphasize (Br. in Opp. 22-24) that Section 7631(f) imposes an entity-wide restriction and thus prevents an affiliate from spending even private funds to espouse prostitution or sex trafficking. But respondents do not dispute that they can

form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding. It is no answer, then, to say that even if Section 7631(f) does not infringe respondents' speech rights (because they may form affiliates and otherwise continue operating as they do now), it infringes their *affiliates'* speech rights. If an affiliate does not want to serve as a vehicle for the receipt and administration of federal funds, it does not have to do so. It may simply decline to accept federal HIV/AIDS funding. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient[] can simply decline the subsidy."). The agencies' guidelines, however, allow respondents to form special-purpose affiliates and thereby cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue.[2]

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[2] HHS and USAID previously have modified their guidelines to provide funding recipients with additional flexibility in partnering with affiliates not subject to Section 7631(f). See pp. 7-8, *supra*; Pet. 8-9. This Office has been informed that HHS and USAID are considering revisions to their guidelines that would allow funding recipients different methods for demonstrating compliance with the statutory requirement (*i.e.*, demonstrating that they have a policy explicitly opposing prostitution and sex trafficking). Those revisions, however, would not affect the need for this Court's review of the decision below, because the court of appeals held that the policy requirement itself violates the First Amendment (by compelling funding recipients to speak), without regard to how funding recipients show that they have complied with Section 7631(f).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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